IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 527 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ATAJI MOHANJI MAKWANA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 527 of 1993

MR G RAMAKRISHNAN for Petitioner No. 1 (absent)

MR KP RAVAL APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 27/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Ataji Mohanji Makwana and his wife Kaliben were tried for the offence punishable under Section 302 of IPC and Section 302 read with Section 114 of IPC for causing death of deceased-Mangaji on 15.11.1991 at 7.30 p.m. at village Majra. The learned Additional Sessions Judge, Sabarkantha at Himatnagar by his impugned judgment and order dated 26.4.1993 acquitted the accused No.2-Kaliben by giving benefit of doubt for the offence under Section 302 read with Section 114 of IPC and Section 323 of IPC. However, he convicted the present appellant-accused for the offence under Section 302 of IPC as well as Section 324 of IPC and sentenced him to suffer life imprisonment and to pay a fine of Rs.250/= in default to further undergo 7 days S.I. for offence under Section 302 IPC and R.I. for one year for the offence under Section 324 of IPC. Both the sentences were ordered to run concurrently. This order of conviction and sentence passed by the learned Additional Sessions Judge in Sessions Case No.17 of 1992 is challenged by the present accused in this appeal, which is filed through jail.

#. Mr.G.Ramakrishnan, learned advocate was appointed to defend the appellant-accused in this appeal. But, unfortunately he was not present when the matter was called out today. It may be stated that this appeal was listed at Sr. No.32 of running final hearing board dtd. 26.11.2001. The appeal is old one and the accused is in jail since long, therefore, with the assistance of learned APP Shri Raval we are deciding this appeal on merits in absence of Mr.Ramakrishnan, learned counsel for the appellant.

#. Mr.Raval, learned APP has produced on record photostat copy of jail record of the appellant-accused. As per the jail record, he has actually undergone sentence of 8 years 3 months and 3 days and set off of 1 year 5 months and 10 days. Thus, in all, he has almost undergone sentence of almost 10 years. In addition to that he has earned remission of 2 years as per the State Government Policy. Thus, he has already undergone sentence of more than 12 years.

#. The appellant-accused No.1-Ataji Mohanji is husband of accused No.2-Kaliben. Accused No.1-Ataji has got two brothers. Dhayaji Mohanji is his elder brother whereas, deceased-Mangaji Mohanji was his younger brother, who has been alleged to have been killed by the accused. Complainant-Balvantsinh Dhayaji is nephew of accused

No.1-Ataji. All the parties are agriculturists staying at village Majra of taluka Prantij. House of accused No.1 Ataji and deceased-Mangaji are opposite to each other in Motavas, whereas, Dhayaji-father of complainant was staying in his newly constructed house near Ramapir.

#. As per the prosecution case, complainant-Balvantsinh Dayaji PW-1 Ex.15 lodged complaint in the late night of 15.11.1991 before Prantij Police Station to the effect that on that day at about 7.00 p.m. he was at his home. At that time Ujamben PW-2 Ex.16 wife of his uncle Mangaji came to his house and told him that Ataji and Kaliben accused Nos.1 and 2 respectively were giving abuses. His uncle is at his field, therefore, he (complainant) may come and pursue them not to abuse them. Thereupon, the complainant went along with Ujamben at her house. His brother Jaga followed them. At that time deceased-Mangaji came to his house from the field. Deceased and complainant both came to the house of the accused and told him that "uncle, why are you abusing? If you want your share then take it in the presence of five persons". Thereupon accused No.1 came out from the house giving abuses to them with open knife in his hand and gave blow on the neck of deceased-Mangaji. Deceased fell down on the ground. Complainant tried to save the deceased, therefore, accused No.1 gave two knife blows one on his left chest and the other on his left shoulder. He also received injury on his right hand while trying to save the blow. At that time Ujamben came there to save him. Thereupon accused No.2 Kaliben wife of accused No.1-Ataji came there with stick and gave stick blow to Ujamben on her hand. In the meanwhile accused No.1-Ataji chased Jaga-brother of complainant with knife in his hand, therefore, Jaga ran away from there. At that time Takhatsinh Umedsinh and Gandabhai Leelabhai came there running. They brought deceased in vehicle No.407 at Himatnagar Civil Hospital where he was declared dead by doctor. The complainant was also treated there. It had so happened that when deceased-Mangaji and complainant brought to Himatnagar, Mangaji died on the way to hospital at Himatnagar. At that time Dr.Manishbhai Amrabhai PW-3 Ex.24 who was present there in the hospital informed at about 9.15 p.m. to the Himatnagar Police Station on telephone, which is at Ex.40. The same was registered in writing in Telephone Register and on the basis of the same PSI, Mr.Vaishnav examined at Ex.31 started investigation. He came to the Himatnagar Civil Hospital. There he came to know that the deceased has died. Thereupon he took complaint of Balvantsinh in writing which was marked 5/1. On the next day morning inquest postmortem was made and the panchnama of scene of

offence was prepared. The accused were arrested and arrest panchnama was also made. Accused No.1 lodged complaint at Ex.18 against the prosecution witnesses regarding the injuries received by him during the incident. After completing the investigation, police filed charge sheet against accused, which was committed to the Sessions Court and later on Addl. Sessions Judge, Sabarkantha at Himatnagar tried for the offences said earlier.

#. The prosecution examined two eye witnesses; (1) Balvantsinh Dhayaji, nephew of deceased-Mangaji PW-1 Ex.15 and Ujamben, wife of deceased PW-2 Ex.16. During the investigation, the accused examined himself on oath. In support of his defence, on the charge that he committed murder of deceased-Mangaji, to save his own life he pleaded self-defence. In support of his case, he also placed reliance on NC complaint lodged by him at Ex.18 on the next day of incident. In addition to that he examined Dr.Arun Singh Bhati, Medical Officer Ex.47 who had examined him on 16.11.1991.

#. Thus, from the evidence of the prosecution witnesses Balvantsinh Dhayaji, Ujamben Mangaji, which is proved beyond reasonable doubt that deceased-Mangaji died due to the injuries caused by the appellant-accused No.1-Ataji with knife on the day of incident. In fact, more or less it is also admitted by the appellant-accused himself in his NC complaint at Ex.18. Thus, incident is proved. However, the question is whether the prosecution witnesses have unfold the real story or not and what offence is committed by the appellant-accused? Would it attract major offence under Section 302 of IPC or offence under Section 304 Part-I of IPC? If we are not inclined to accept the defence version of the appellant-accused that in his self-defence he inflicted knife injuries to the deceased-Mangaji, which caused his death, then he has also been convicted for the offence under Section 324 of IPC for causing knife injuries on the chest of complainant-Balvantsinh for the he has been sentenced to suffer R.I. for one year. We have no doubt at all in our mind that it is the appellant-accused who caused knife injuries on the chest of the complainant-Balvantsinh Dhayaji for which he has been rightly convicted by the learned Trial Judge.

#. However, from the evidence on record led by the prosecution witness itself, it is clear that the incident in question took place out of heated situation by accused No.1-Ataji. According to Ujamben the accused No.1-Ataji was abusing her husband-Mangaji in the field, then the

presence of accused should have been at the field and not at his house. It seems that earlier incident was over and what actually happened prior to the real incident is not coming forth. The very fact that the appellant accused No.1-Ataji received injury on his head is not in dispute. It was the bounden duty of the prosecution to explain the injury received during the incident which they failed to do so. However, that itself would not be a ground to give a clean chit to the appellant-accused No.1 or to give benefit of doubt. However, at the same time we have to be cautious while appreciating the evidence of the prosecution witness for the above incident.

#. Having considered the entire evidence of the prosecution carefully as well as the defence case, we are of the considered opinion that the accused must have the knife when he was beaten with sticks by the deceased-Mangaji and complainant-Balvantsinh, but they were armed with sticks, whereas the appellant-accused was armed with knife. Therefore, in our considered opinion, he had exceeded the right of self-defence for which he cannot be convicted for the major offence under Section 302 of IPC. In this case, appellant-accused can only be convicted for the offence either under Section 304 Part-I IPC and not under Section 302 of IPC.

##. Accordingly, this appeal is partly allowed and the impugned order of conviction passed by the learned Additional Sessions Judge convicting the appellant-accused No.1-Ataji Mohanji Makwana for the offence under Section 302 IPC is altered and he is convicted under Section 304 Part-I of IPC. We maintain the order of conviction and sentence passed by the learned Addl. Sessions Judge convicting him for the offence under Section 324 of IPC. The appellant-accused has already remained in jail for more than 10 years, therefore, in our considered opinion the order of sentence as already undergone would be just and proper. The order of conviction passed by the learned Trial Judge convicting the appellant-accused for the offence under Section 324 is confirmed. However, substantive sentence of one year R.I. is also confirmed. But on the facts of this case, we do not see any reason to maintain order of fine of Rs.250/-. Accordingly it is set aside. The appellant-accused No.1-Ataji Mohanji Makwana be released forthwith, if not required in any other case. Fine, if paid shall be refunded to him.

(B.J.Shethna, J.)

(D.P.Buch, J.)

*Pvv